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91-1726

Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER, 1991 TERM

PHANTOM TOURING COMPANY,

Petitioner,

v.

AFFILIATED PUBLICATIONS, INC.,
GLOBE NEWSPAPER CORPORATION,
KEVIN KELLY and PATTI HARTIGAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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QUESTION PRESENTED FOR REVIEW

WHETHER A DEFAMATORY ASSERTION WHICH IS SUFFICIENTLY FACTUAL TO BE PROVED TRUE OR FALSE IS ENTITLED TO A FIRST AMENDMENT PRIVILEGE BECAUSE A COURT, AT THE PLEADING STAGE, INTERPRETS THE ASSERTION AS EXPRESSING A POINT OF VIEW ONLY.

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REPORTED OPINIONS OF THE COURTS BELOW

The opinion of the United States Court of Appeals for the First Circuit is the only reported opinion produced in this action. That opinion appears as follows: Phantom Touring, Inc. v. Affiliated Publications, 953 F.2d 724 (1st Cir. 1992).

STATEMENT OF JURISDICTION

The United States Court of Appeals for the First Circuit entered the judgment sought to be reviewed on January 10, 1992.

Title 28, United States Code, Section 1254(1) confers jurisdiction on this Court to review by writ of certiorari the final judgment of the United States Court of Appeals for the First Circuit.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Fourteenth Amendment, Section 1

All persons born or naturalized in the United States, and subject to jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This libel action was commenced in the United States District Court for the District of Massachusetts, invoking that court's diversity jurisdiction under 28 U.S.C. §1332. The plaintiff/petitioner is a general partnership organized under the laws of the Commonwealth of Pennsylvania, none of whose partners is a citizen of Massachusetts.[1/]

The defendants/respondents, the corporate owners of the Boston Globe and two journalist employees of the Globe, are all citizens of Massachusetts. The amount in controversy exceeds Fifty Thousand Dollars ($50,000.00)

Petitioner, Phantom Touring Company, is the producer of a live theatrical production entitled "The Original Stage Musical, The Phantom Of The Opera, By Ken Hill" (hereinafter "Phantom"), which has toured throughout the United States.

Respondents, Kevin Kelly and Patti Hartigan, write articles which appear in the Boston Globe, a general circulation daily newspaper owned and operated by respondents, Affiliated Publications, Inc. and Globe Newspaper Corporation.[2/]

Petitioner's Phantom is a musical comedy, created by British playwright Ken Hill, which includes the music of several classical composers. This Phantom was first performed at the

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1/ The Court of Appeals erroneously designated the plaintiff partnership as a corporation in the caption of this case below. Petitioner does not know the genesis of this error.

2/ The Court of Appeals mistakenly omitted to designate Affiliated Publications, Inc. as a corporation in the caption of this case below. Again, petitioner does not know the origin of this error.

Duke's Playhouse in Lancaster, England in 1977. In 1984, petitioner's Phantom was presented at the Theatre Royale in London, England, where Andrew Lloyd Webber saw it and became interested in the story.

Webber and Hill discussed a collaboration to bring Hill's show to London's West End, but Webber instead wrote his own version of Phantom, which opened in London in October, 1986 and moved to New York in January, 1988. Webber's production has received wide attention.

Meanwhile, petitioner's Phantom was presented in St. Louis in July, 1986 where it attracted the attention of Jonathan Reinis, a San Francisco theater owner and a principal of petitioner Phantom Touring Company. Thus began the process of bringing petitioner's Phantom to San Francisco and, eventually, on nationwide tour. This tour was to stop in Boston in January, 1990.

During a two-week period beginning on September 22, 1989, just as petitioner's Phantom tickets went on sale in Boston, respondents published at least six false and defamatory articles in the Boston Globe concerning petitioner's Phantom. Among other things, the articles accused petitioner of:

- "fraud" (article entitled "The phantom of 'The Phantom'");
- a "misleading" advertising campaign ("'Fiddler' is the real thing"); and
- "deliberate" deception of the public as to the "true identity" of the play which petitioner was presenting ("The phantom of 'The Phantom'" and "Canny, confusing marketing for this 'Phantom'").

Five of these articles are described in chronological order below, and are reproduced in the Appendix beginning at p. 22a. Significantly, these articles were not critics' reviews of petitioner's Phantom. The challenged articles were written more than three months before the production was scheduled to arrive in Boston and at a time when neither of the respondent authors had seen the play.

A. "The phantom of 'The Phantom,'" by Kevin Kelly. Boston Globe, September 22, 1989.[3/]

Respondent Kelly accused petitioner of "deliberate[ly]" misleading the public in order "to score off the success of Andrew Lloyd Webber's 'Phantom.'" This article also stated:

> "David Richards, drama critic for the Washington Post, called it 'a rip-off, a fraud, a scandal, a snake-oil job.'
>
> * * *
>
> Admittedly or not, Hill has been thriving off the confusion created by the two productions.
>
> * * *
>
> While swearing that the public is informed of the differences between the two, Hill & Company has been running ads headlined 'Original London Production.' ... [B]ut the link to Webber's $5 million 'Phantom' ... has to be subliminally deliberate. The advertising amounts to truth in advertising with an undertow."

3/ Reproduced at p. 22a, infra.

B. "Ticket buyers are still hot for 'Phantom,'" by Patti Hartigan. Boston Globe, October 5, 1989.[4]

Respondent Hartigan wrote:

> "The production is being billed as the 'Original London Stage Musical' but is in no way related to the Andrew Lloyd Webber 'Phantom' that was a smash hit in London and has broken all ticket records in New York since it opened in January, 1988."

C. "'Fiddler' is the real thing," by Kevin Kelly. Boston Globe, October 5, 1989.[5]

In another of his articles, purporting to be a review of the musical "Fiddler on the Roof," respondent Kelly wrote that:

> "[A]t the Wang Center, ... hordes of people are currently being suckered in by a second-hand version of 'Phantom of the Opera' due in January."

In the same article, he contrasted "Fiddler" with:

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[4] Reproduced at p. 27a, infra.

[5] Reproduced at p. 30a, infra.

> "the misleading ads ... subliminally linking the Wang's upcoming 'Phantom of the Opera' to Andrew Lloyd Webber's international hit."

This article contained no other references to Phantom, no mitigating context whatsoever, and no "give and take" or presentation of both sides of the issue.

D. "Canny, confusing marketing for this 'Phantom,'" by Kevin Kelly. Boston Globe, October 6, 1989.[6/]

In this article, Kelly wrote that petitioner's Phantom "is deliberately confusing people." Kelly declared that "[i]t is the Webber 'Phantom' that's original." He called petitioner's production "a rip-off" which at least one producer had rejected "on strict ethical grounds."

> "There are rumors that scalpers are horning in on the act, securing bundles for later resale, resale that would have to be accomplished before the show opens Jan. 9 and its true identity is known."

6/ Reproduced at p. 34a, infra.

E. "Williams and 'The Phantom,'" by Patti Hartigan. Boston Globe, October 7, 1989.[7]

Respondent Hartigan, in this Globe article, quotes respondent Kelly stating that petitioner was "blatantly misleading the public." The article went on to say:

> "WRKO host [Jerry Williams] said he had been 'taken in' by advertisements for what he called the 'phony "Phantom"' .... The ads bill the show as the 'Original London Stage Musical,' but it is not the famous 'Phantom' written by Andrew Lloyd Webber ...."

After publication of these articles, petitioner commenced this action, alleging that the accusations of deliberate dishonesty, which were expressed and implied by the Globe, were both false and defamatory.

Respondents filed a Motion For Judgment On The Pleadings in the District Court, asserting that the libel claims should be dismissed because the challenged publications were Constitutionally-protected "opinions." The District Court (Walter Jay Skinner, D.J.) granted the Motion, writing:

> "I have carefully examined the publications and conclude that in context they contain only protected expressions of opinion, and do not imply criminal conduct on the part of the plaintiff."

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[7] Reproduced at p. 37a, infra.

Petitioner filed a timely motion for reconsideration and, following announcement of this Court's decision in Milkovich v. Lorain Journal Co., ___ U.S. ___, 110 S. Ct. 2695 (1990), moved to vacate the judgment on the ground that there is no Constitutional privilege to defame with "opinions." Both motions were denied.

On appeal, the United States Court of Appeals for the First Circuit affirmed in a published opinion. Phantom Touring, Inc. v. Affiliated Publications, 953 F.2d 724 (1st Cir. 1992).

REASONS FOR GRANTING THE WRIT

This case, which presents an important issue under the First Amendment, was decided by the Court of Appeals in a manner which is squarely inconsistent with the governing pronouncement of this Court in Milkovich v. Lorain Journal Co., ___ U.S. ___, 110 S. Ct. 2695 (1990).

Milkovich removed the "opinion" privilege from First Amendment analysis. In the present case, in order to uphold a grant of judgment on the pleadings against the petitioner, the Court of Appeals applied exactly the same analysis which was formerly known as the opinion doctrine. Instead of using the term "opinion," however, the Court of Appeals said that the accusations of deliberate dishonesty in this case were "a point of view only," and were therefore entitled to absolute immunity under the First Amendment. Phantom Touring, Inc. v. Affiliated Publications, 953 F.2d 724, 727 (1st Cir. 1992).

This obvious recycling of the opinion doctrine was clearly not the intent of this Court when it announced the Milkovich decision. This Court should grant certiorari to review the judgment of the Court of Appeals, in order to prevent the lower courts from simply perpetuating the "opinion" doctrine under the guise of a different label.

In its published opinion in the present case, the Court of Appeals wrote:

> "Arguably, the connotation of deliberate deception is sufficiently factual to be proved true or false, and therefore is vulnerable under Milkovich. To rebut the implied assertion, appellant might be able to present objective evidence demonstrating longstanding plans to take its 'Phantom' on a nationwide tour of the

> United States, or evidence showing that the 'Original London production' language in its advertising was developed before Webber's 'Phantom' rose to prominence, and thus was not designed to deceive customers."

Phantom Touring, 953 F.2d at 729.

Recognizing that these accusations are objectively factual, the Court of Appeals nevertheless found them privileged under the First Amendment because:

> "The sum effect of the format, tone and entire content of the articles is to make it unmistakably clear that Kelly was expressing a point of view only. As such, the challenged language is immune from liability."

Id. This, of course, is merely the "opinion" doctrine poorly disguised. Clearly, replacing the terminology of "opinion" with the new terminology of "point of view" cannot satisfy the mandate of Milkovich.

The First Circuit interpreted Milkovich v. Lorain Journal Co., ___ U.S. ___, 110 S. Ct. 2695 (1990), as merely changing the labels used to describe the old "opinion" vs. "fact" dichotomy. The Court of Appeals did not understand that this Court's Milkovich decision imposes a tight limitation on the power of judges to usurp the jury's function of interpreting an allegedly defamatory communication. Citing the First Amendment to the Constitution of the United States, the court below transgressed that limitation.

The plaintiff in Milkovich had testified during each of two successive hearings, both of which concerned his involvement in a brawl at a high school wrestling match. The first hearing resulted in a decision against him, while the second

hearing resulted in a decision favorable to Milkovich. Referring to these events, the defendants published a newspaper article which implied that Milkovich had perjured himself at the second hearing.

Milkovich commenced a libel action in the Ohio courts. The media defendants obtained summary judgment on the ground that, when the context of the challenged article was scrutinized, it simply expressed an "opinion" which was "Constitutionally protected."

To arrive at this result, the Ohio courts necessarily made two important rulings. First, they implicitly determined that the mitigating "context" was strong enough to take the issue of interpretation away from the jury. Second, to interpret the challenged article and its context, the Ohio courts applied the four-factor test enunciated in Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984), and concluded that, in context, the apparent accusation of perjury was mere "opinion."

This Court granted certiorari and reversed. In the first and lengthiest part of the Milkovich opinion, this Court reviewed the privileges which have been, and still remain, available to those who comment on matters of public concern. This Court refused to adopt a separate "wholesale defamation exemption for anything that might be labeled 'opinion.'" Milkovich, 110 S. Ct. at 2705. Thus, after Milkovich, the term "opinion" no longer carries with it a talismanic immunity for the defamer.

This prominent portion of the Milkovich decision has led to the misperception that Milkovich represents nothing more than a disagreement over labels; that the old "opinion" privilege has simply been replaced by the newer "conveys no facts" doctrine, or even, in the judgment of the First Circuit, by the "point of view" privilege. Thus, in its published opinion in this case, the First Circuit wrote:

> "[W]hile eschewing the fact/opinion terminology, Milkovich did not depart from the multi-factored analysis that had been employed for some time by lower courts seeking to distinguish between actionable fact and nonactionable opinion. See, e.g., McCabe v. Rattiner, 814 F.2d 839, 842 (1st Cir. 1987) (adopting totality of the circumstances analysis); Ollman v. Evans, 750 F.2d 970, 974-75 (D.C. Cir. 1984) (en banc) (same)."

Phantom Touring, Inc. v. Affiliated Publications, 953 F.2d 724, 727 (1st Cir. 1992).

This mistaken reading of Milkovich has been echoed by at least two noted commentators. For example, Smolla, Law of Defamation §6.03[7][d], observes:

> "The Court in Milkovich was primarily rejecting only the terminology of 'fact v. opinion.' The Court actually endorsed rather than rejected the essential substance of the previously existing constitutional protection for opinion. ... [T]he rich body of jurisprudence developed by the lower courts during the last two decades under the rubric of the 'opinion' doctrine remains alive and well."

(Emphasis in original). Similarly, Sanford, Libel and Privacy §5.3, states:

> "[F]ar from being obsolete, pre-Milkovich opinion cases -- particularly those which engaged in thoughtful analysis rather than superficial classification -- remain useful in analyzing the factual objectivity and verifiability of statements pursuant to the Milkovich test."

This Court in Milkovich, however, did not merely disagree with the semantic labels ("opinion" vs. "fact") which the Ohio courts had employed in granting and upholding the summary judgment for the media defendants. Instead, this Court did disagree with and overrule the analysis which had been developed by the lower courts. Specifically, this Court reversed the implicit determination of the Ohio courts that the mitigating "context" in that case was sufficiently conclusive to permit summary disposition without a jury.

This Court found Constitutional error in the opinion doctrine, and in the Ohio courts' application of it, because the lower courts had seen the doctrine as an invitation to wade into complex and subtle factual analyses to determine how "reasonable readers" would interpret a publication. See, e.g., Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984) (finding, over dissent, that the statement "Ollman has no status within the profession, but is a pure and simple activist" to be protected opinion).[8/]

Milkovich teaches that these determinations belong to the jury. As this Court wrote in Milkovich:

> "The dispositive question in the present case then becomes whether or not a reasonable factfinder could conclude that the statements in the Diadiun column imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding. We think that question must be answered in the affirmative. ... This is

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8/ Ollman seems to us a classic example of the central flaw in the opinion doctrine. The very fact that different appellate jurists addressing the same case disagree as to the interpretation of a publication, appears to us to require the issue of interpretation to be submitted to the jury.

> not the sort of loose, figurative or hyperbolic language which would negate the impression that the writer was seriously maintaining petitioner committed the crime of perjury. Nor does the general tenor of the article negate this impression."

110 S. Ct. at 2707 (emphasis added).

This brief passage is the key to understanding why this Court reversed the lower courts in Milkovich; in other words, why Milkovich stands for more than a mere semantic disagreement with the opinion doctrine. Specifically, Milkovich holds that "context" may defuse an otherwise defamatory implication so as to preempt a jury as a matter of Constitutional law, only where that context negates the defamatory implication. This presents a far more stringent standard for preempting jury consideration than had prevailed under the opinion doctrine.

The error of the Court of Appeals in the present case was its failure to obey the brief but crucial passage from Milkovich which is quoted above. Instead of asking whether the context of the Globe articles negated their defamatory implications, the First Circuit applied a far lesser standard. It permitted its own subtle balancing of conflicting contextual clues to supplant that of a jury. It applied precisely the same opinion doctrine which has been overruled by this Court.

The accusations of deliberate dishonesty against the petitioner in this case were not of the outlandish variety which, when read literally, are simply nonsensical in their overall context. In other words, these accusations are not mere "hyperbole," which has appropriately found protection in prior decisions of this Court and which would "negate" liability under Milkovich.

- This case, for example, does not present a renowned evangelist "accused" of an incestuous rendezvous in an outhouse.[9/] No one would believe such a thing.

- This case is unlike a worker who crossed a picket line and was "accused" of the crime of treason.[10/] That charge, read literally, is nonsensical.

- Nor is this case akin to a hard bargainer "accused" of blackmail.[11/] Where the context was known, that accusation was patently not factual.

The outlandish "hyperbole" in each of these examples is easily recognized by all, without the need for any delicate balancing of contextual clues in an attempt to avoid the natural and obvious meaning of words.

Here, by distinct contrast, the Globe articles concern two stage productions which bear the same name. These Globe articles accuse the earlier but lesser-known producer of deliberately deceiving the public into believing they are buying tickets to the later, but better-known and critically praised production.

9/ See, Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 108 S. Ct. 876 (1988).

10/ See, Old Dominion Branch, National Association of Letter Carriers v. Austin, 418 U.S. 264, 94 S. Ct. 2770 (1974).

11/ See, Greenbelt Cooperative Publishing Association v. Bresler, 398 U.S. 6, 90 S. Ct. 1537 (1970).

This is not a lusty and imaginative accusation which is grossly out of proportion to its context, as in Falwell, Austin and Bresler. On the contrary, the accusation of deception is direct and factual, and appears to proceed logically from the context of the two "Phantoms." Reasonable readers could so believe.

This accusation is not couched in imprecise or figurative language. Indeed, "deliberate," "fraud" and "misleading" are well-defined words, and nothing in the Globe articles deters the reader from accepting them for their natural and obvious meaning. Certainly nothing here "negates" their natural meaning.

The pervasive theme of the Globe articles is that deliberate deception is being engineered by the petitioner Phantom Touring Company. Read fairly or unfairly, skimmed or scrutinized, the same theme emerges:

> (a) The advertising for petitioner's lesser-known Phantom produces enormous ticket lines.
>
> (b) That advertising could lead to confusion in a consumer's mind as to which Phantom is coming to town.
>
> (c) Indeed, petitioner's claims ("original," "London production," and "Phantom of the Opera") seem to be descriptive of the better-known Andrew Lloyd Webber Phantom.
>
> (d) This advertising "link" to Webber's Phantom was deliberately devised by the petitioner.

The inescapable message of fraud allegedly perpetrated by the petitioner is factual. The Globe accusations have gravely

harmed petitioner's reputation by announcing that Phantom Touring Company has forsaken honesty and integrity in exchange for pecuniary gain. Compare, Masson v. New Yorker Magazine, ___ U.S. ___, 111 S. Ct. 2419, 2435 (1992) (noting that it is potentially defamatory to suggest that someone "forsakes intellectual integrity in exchange for pecuniary gain"). The Court of Appeals for the First Circuit erred in ruling that the First Amendment deprived petitioner of a remedy for this unjustified and false attack.

Petitioner asks that this Court grant certiorari because the First Circuit has squarely disregarded this Court's Milkovich ruling.

CONCLUSION

For the reasons set forth above, petitioner Phantom Touring Company respectfully requests that this Court grant its petition for writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 91-1590.
91-1741.

PHANTOM TOURING, INC.,
Plaintiff, Appellant,

v.

AFFILIATED PUBLICATIONS, ET. AL.,
Defendants, Appellees.

JUDGMENT
Entered: January 10, 1992

This cause came on to he heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:
Francis P. Scigliano
Clerk.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 91-1590
91-1741

PHANTOM TOURING, INC.,
Plaintiff, Appellant,

v.

AFFILIATED PUBLICATIONS, ET AL.,
Defendants, Appellees.

APPEALS FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF MASSACHUSETTS

[Hon. Walter Jay Skinner,
U.S. District Judge]

Before

Breyer, Chief Judge,
Coffin, Senior Circuit Judge,
and Selya, Circuit Judge.

January 10, 1992

COFFIN, Senior Circuit Judge. Appellant Phantom Touring Company produces a musical-comedy version of "The Phantom of the Opera" that is not the hugely successful, widely acclaimed Broadway show later created by Andrew Lloyd Webber. In a series of articles published in late 1989, the Boston Globe queried, in a disparaging tone, whether appellant's advertising made the distinction between the two "Phantoms" clear to the ticket-buying public. Appellant sued for defamation,[1] claiming that the newspaper falsely accused it of a deliberate effort to pass off its show -- dubbed the "Fake Phantom" -- as "the real thing." The district court dismissed the complaint on the ground that the articles contained only statements of opinion protected by the First Amendment. We agree that none of the articles is actionable and, therefore, affirm.

I. Background[2]

The original "Phantom of the Opera" is a 1911 novel by Gaston Leroux, which is now in the public domain and therefore available for adaptation by anyone who chooses to make use of it. Appellant's version, a musical comedy show featuring the music of several classical composers, was created by British playwright Ken Hill and performed publicly for the first time in 1977 at the Duke's Playhouse in England. In 1984,

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1/ The complaint also contained causes of action for interference with contractual rights and interference with prospective business advantage. Appellant does not press these claims on appeal.

2/ We draw our background information primarily from the complaint, a sworn statement of facts by the producer of appellant's "Phantom" and appellant's reply to defendants' counterclaims.

the Hill production again was staged in England, where Andrew Lloyd Webber saw it. Webber and Hill began negotiations to bring the show to London's West End, but nothing ever came of the collaboration. Instead, Webber wrote and, in October 1986, opened his own "Phantom" in London. The Webber production, a drama with an original musical score, became what the Globe termed a "megahit." In January 1988, Webber's "Phantom" opened in New York.

Meanwhile, in July 1986, Hill's "Phantom" was revived for a short run in St. Louis. It attracted the attention of Jonathan Reinis, a theatre producer, who brought the show to San Francisco for a nine-month run beginning in September 1988. Buoyed by the show's success in San Francisco, Reinis and others formed the appellant Phantom Touring Company to take the show on a national tour that included a visit to the Wang Center in Boston.

In September 1989, about a week before tickets for Hill's "Phantom" at the Wang were to go on sale, the Globe published the first of a number of articles suggesting that ticket buyers should be wary of Hill's "Fake Phantom." According to the article, headlined "The phantom of 'The Phantom,'" Hill had been "thriving off the confusion created by the two productions." The article quoted a drama critic for The Washington Post who said Hill's version " 'bears as much resemblance to its celebrated counterpart as Jell-O does to Baked Alaska,'" and who further described the show as " 'a rip-off, a fraud, a scandal, a snake-oil job.'"

This story and at least one other that followed not only pointed out that Hill was benefiting from mistaken identity, but also suggested that the confusion was intentional. The newspaper observed that the show was being advertised in bold type as "The Original London Stage Musical." While technically accurate, since Hill's production in fact predated Webber's, the

notice appeared to the Globe to be drawing heavily on the reputation of the Webber show.

Appellant filed suit in November 1989, alleging that the Globe articles contained false and defamatory statements and innuendo concerning Phantom Touring.[3/] The complaint referred to numerous specific phrases and words in the articles as well as to an alleged underlying message that the plaintiff was dishonest and intentionally misleading or cheating the public.

Defendants moved for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) and, in a brief order written on the face of the motion, the district court ruled for the Globe. It explained its decision as follows:

> I have carefully examined the publications and conclude that in context they contain only protected expression of opinion and do not imply criminal conduct on the part of the plaintiffs.

Appellant unsuccessfully moved for reconsideration and, following the Supreme Court's decision in Milkovich v. Lorain Journal Co., 110 S. Ct. 2695 (1990), which clarified the principles governing the First Amendment's protection of statements of opinion, urged the district judge to vacate its ruling. The district court denied appellant's motion, holding, without discussion, that "the judgment should stand even in the light of Milkovich."

3/ The Boston Globe is owned and operated by defendants Affiliated Publications, Inc. and Globe Newspaper Corporation. For the sake of convenience, we refer to the corporate defendants solely as the Globe. Phantom Touring also sued two individual writers, Kevin Kelly and Patti Hartigan, who wrote the relevant articles.

In this appeal, Phantom Touring contends that the district court's decision reflects the erroneous view that all of the disputed statements in the Globe articles were privileged under the First Amendment simply because they could be classified as opinion. Appellant argues that a careful analysis of the articles, in light of the principles set out in Milkovich, demonstrates that it is entitled to jury consideration of its libel claim. In the next section, we describe briefly how Milkovich affected defamation law and why application of the principles expressed in that opinion require us to affirm the district court's judgment.

II. Discussion

A. Legal Framework[4/]

In Milkovich, the Supreme Court dismissed the notion that there is a "wholesale defamation exemption for anything that might be labeled 'opinion'." 110 S. Ct. at 2705. It concluded that the relevant question is not whether challenged language may be described as an opinion, but whether it reasonably would be understood to declare or imply provable assertions of fact. See id. at 2707.

Notwithstanding its rejection of a specific "opinion" privilege, the Court assured that opinions about matters of public concern would continue to receive substantial constitutional protection under various extant First Amendment

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4/ The Globe argues that we should apply Massachusetts constitutional and common law, arguably more generically protective of statements of opinion than the First Amendment. Because we believe the challenged articles are protected under First Amendment doctrine, as laid out in Milkovich, we need go no further. Moreover, we think it likely that it is the basis upon which the district court made its decision.

principles. It reaffirmed three propositions which are relevant to our consideration of this case in its present posture. The first, of "[f]oremost" importance, is the principle established in Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986), that statements made by a media defendant "must be provable as false" before there can be defamation liability. 110 S. Ct. at 2706. The Court reaffirmed that " Hepps ensures that a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection." Id. (footnote omitted). Thus, a statement such as, "That's the worst play I've ever seen," would be protected not because it is labeled an opinion but because it is so subjective that it is not "susceptible of being proved true or false," id. at 2707.

Secondly, Milkovich emphasized a line of cases establishing protection for statements that "cannot 'reasonably [be] interpreted as stating actual facts' about an individual," 110 S. Ct. at 2706 (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50 (1988) (involving ad parody)). See also Letter Carriers v. Austin, 418 U.S. 264, 284-86 (1974) (use of the word "traitor" not basis for defamation action since used "in a loose, figurative sense"); Greenbelt Cooperative Publishing Ass'n, Inc. v. Bresler, 398 U.S. 6, 14 (1970) (the word "blackmail" not actionable in context). These cases explicitly protect "rhetorical hyperbole" and other types of "imaginative expression" that writers use to enliven their prose. 110 S. Ct. at 2706. For example, a theater critic who wrote that, "The producer who decided to charge admission for that show is committing highway robbery," would be immune from liability because no reasonable listener would understand the speaker to be accusing the producer of the actual crime of robbery.

In addition to considering whether the challenged speech contained "loose, figurative, or hyperbolic language which would negate the impression" that a factual statement was being made, id. at 2707, the Court also indicated that the

context in which language appears must be evaluated to see whether "the general tenor of the article negate[s] this impression," id. Thus, while eschewing the fact/opinion terminology, Milkovich did not depart from the multi-factored analysis that had been employed for some time by lower courts seeking to distinguish between actionable fact and nonactionable opinion. See, e.g., McCabe v. Rattiner, 814 F.2d 839, 842 (1st Cir. 1987) (adopting totality of the circumstances analysis); Ollman v. Evans, 750 F.2d 970, 974-75 (D.C. Cir. 1984) (en banc) (same).

Finally, the Court referred to what we would characterize as a safety valve determination, in which we are obliged to "'make an independent examination of the whole record,'" Milkovich, 110 S.Ct. at 2705 (quoting Bose Corp. v. Consumers Union of United States Inc., 466 U.S. 485, 499 (1984) (quotation omitted)), to "assur[e] that the foregoing determinations will be made in a manner so as not to 'constitute a forbidden intrusion o[n] the field of free expression,'" id. at 2707 (quoting Bose, 466 U.S. at 499 (quotation omitted)).

B. Application of the Legal Principles

In its complaint, appellant referred to six articles that appeared in the Globe between September 22 and October 7, 1989. One of those articles is not discussed in the brief on appeal, and we therefore assume that appellant does not seek review of the district court's decision with respect to that article.[5/] Appellant does argue in its appellate brief, however, that another article, one not cited in the complaint, was defamatory. The story, "'Phantom" Confusion Still Flaring," was published on October 13, 1989, before appellant filed its

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5/ The article apparently dropped from the case appeared on October 4, 1989 under the headline "Other 'Phantom' Smashes Record."

complaint. We believe this article is not properly before us, and therefore decline to consider it.[6] Accordingly, we turn to our consideration of the remaining five articles.

In our view, most of the challenged language is easily identified as non-actionable under the principles outlined in Milkovich. Many of the statements cited in the complaint and appellate brief either constitute obviously protected hyperbole or are not susceptible of being proved true or false. Such, for example, is the language in "The phantom of the 'Phantom'" quoting a critic who described the Hill production as "a rip-off, a fraud, a scandal, a snake-oil job." Not only is this commentary figurative and hyperbolic, but we also can imagine no objective evidence to disprove it. Whether appellant's "Phantom" is "fake" or "phony" is similarly unprovable, since those adjectives admit of numerous interpretations. See McCabe v. Rattiner, 814 F.2d at 842 ("The lack of precision [in the meaning of the word 'scam'] makes the assertion 'x is a scam' incapable of being proven true or false.")[7]

6/ Appellant appears to believe it appropriate for us to review the October 13 article because several sentences from the piece were cited in its brief in support of its Motion for Reconsideration. We disagree. In our view, a defendant is entitled to knowledge of the precise language challenged as defamatory, and the plaintiff therefore is limited to its complaint in defining the scope of the alleged defamation. If plaintiff wished to enlarge its case beyond the six articles originally challenged, it should have sought to amend the complaint.

7/ It is likewise impossible to verify whether the Hill advertising was -- as described in "The phantom of the 'Phantom' " --"subliminally deliberate," the two words in that phrase seeming to cancel each other out. See The Random House Dictionary of the English Language 1894 (2d ed. 1987)

(continued...)

Appellant's claim of defamation is patently deficient with respect to one news story, "Ticket buyers are still hot for 'Phantom,'" because the article lacks any even arguably defamatory assertions. Appellant's brief points to the following language:

> The production is being billed as the "Original London Stage Musical" but is in no way related to the Andrew Lloyd Webber "Phantom" that was a smash hit in London and has broken all ticket records in New York since it opened in January, 1988.
>
> The ads came into question in May when ticket sales opened in Atlanta, one of the stops on the 70-week national tour. The Georgia Governor's Office of Consumer Affairs looked into the possibility of deception, but determined that the advertisements were not deceptive so long as they included a disclaimer that the show was not the Lloyd Webber version.

We think it inconceivable that the Globe could be held liable for reporting, in the first of these paragraphs, that Hill's "Phantom" is not Webber's. As for the second paragraph, appellant does not challenge the accuracy of the information. Because the article also points out that appellant's Boston

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7/(...continued)
(defining "subliminal" as "existing or operating below the threshold of consciousness").
Similarly, the "truth-in-advertising with an undertow" phrase that appeared in the same article is figurative language with no concrete definition. Even the less figurative assertion that appellants are "blatantly misleading the public," which appeared in "Williams and 'The Phantom,' " is subjective and imprecise, and therefore not capable of verification or refutation by means of objective proof.

advertising includes a disclaimer, it effectively tells readers that the advertising is not deceptive. We thus find nothing actionable in this article.

In our view, appellant's claim of defamation is colorable in only one respect. Two of the contested articles, both columns written by theater critic Kevin Kelly, contain language insinuating that Phantom Touring was marketing its production dishonestly -- that it deliberately was confusing the public. The first such statement appears in "The phantom of the 'Phantom' " [hereafter "The phantom 'Phantom' "], where Kelly questions whether "Hill & Company [is] trying to score off the success of Andrew Lloyd Webber's 'Phantom' ". The second reference appears in "Canny, confusing marketing for this 'Phantom' " [hereafter "Canny marketing"] :

> When it was suggested to Josiah Spaulding, who heads the Wang (and wags it), that, surely, he must be aware the incoming "Phantom" -- a musical comedy by Ken Hill --is deliberately confusing people; that, in fact, it wouldn't be on tour at all if the Webber "Phantom" had not become the megahit it has, he said to me, "We're not in the business of denying any genre to come here and rent the hall."

Arguably, the connotation of deliberate deception is sufficiently factual to be proved true or false, and therefore is vulnerable under Milkovich. To rebut the implied assertion, appellant might be able to present objective evidence demonstrating longstanding plans to take its "Phantom" on a nationwide tour of the United States, or evidence showing that the "Original London production" language in its advertising was developed before Webber's "Phantom" rose to prominence, and thus was not designed to deceive consumers.

Whether or not the allegation of intentional deception meets the "provable as true or false" criterion, however, we

think the context of each article rendered the language not reasonably interpreted as stating "actual facts" about appellant's honesty.[8] The sum effect of the format, tone and entire content of the articles is to make it unmistakably clear that Kelly was expressing a point of view only. As such, the challenged language is immune from liability.

The nonfactual nature of Kelly's articles is indicated at first glance by the format. Both appeared as a regularly run theater column, a type of article generally known to contain more opinionated writing than the typical news report.[9] The structure and tone of the language reinforced this subjective design. In "The phantom 'Phantom,'" for example, the question of appellant' 's dishonesty was posed rhetorically and then immediately defused by Reinis' lengthy response.[10] In

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[8] We offer no views on whether appellant's defamation claim is deficient for reasons other than the nonfactual nature of the challenged language, such as truthfulness or lack of malice.

[9] Although the Court in Milkovich gave no significance to the fact that the challenged article was a sports column, we do not understand the Court to have rejected the relevance of format, but simply to have discounted it in the circumstances of that case. See 110 S. Ct. at 2707 (referring to the general tenor of the article).

[10] The question and answer as they appeared in the article were as follows:

> So the question comes down to, is Hill & Company trying to score off the success of Andrew Lloyd Webber's "Phantom"?

(continued...)

"Canny marketing," the issue again was raised as a question posed to the Wang Center's manager, and Kelly's snide, exasperated language indicated that his comments represented his personal appraisal of the factual information contained in the article. Cf. Milkovich, 110 S. Ct. at 2707 (neither the type of language used nor the general tenor of the article would "negate the impression that the writer was seriously maintaining petitioner committed the crime of perjury").

Of greatest importance, however, is the breadth of Kelly's articles, which not only discussed all the facts underlying his views but also gave information from which readers might draw contrary conclusions. In effect, the articles offered a self-contained give-and-take, a kind of verbal debate between Kelly and those persons responsible for booking and marketing appellant's "phantom." Because all sides of the issue, as well as the rationale for Kelly's view, were exposed, the assertion of deceit reasonably could be understood only as Kelly's personal conclusion about the information presented, not as a statement of fact.

10/(...continued)

> "Whatever confusion there is between the two, Reinis said, "it's about time Ken Hill got his just desserts," a statement implying that Hill has been ill used by Webber and [his producer] Mackintosh. "They've wished us luck. Our attitude is: we're not Andrew Lloyd Webber's 'Phantom.' We say that clearly in the ads. We're not a melodrama. We're musical comedy in the old-fashioned sense. We're nothing near the scope and size of Webber's 'Phantom.' We're an evening's event for entertainment. Our attitude is, you can enjoy both for completely different reasons."

Kelly explained, for example, that he considered appellant's advertising to be misleading -- despite Hill's accurate claim to be the "original" London production -- because

> it is the Webber "Phantom" that is currently the big hit in London, and has been since it opened in 1986. It is the Webber "Phantom" that has broken box office records wherever it has played. It is the Webber "Phantom" that's original. Hill uses music from Verdi, Gounod, Offenbach, Mozart and Donizetti. Webber wrote his own. Hill's is a self-styled "melodramatic spoof." Webber's has a serious book written by himself and Richard Stilgoe. ["Canny marketing"][11/]

Kelly also made clear that he doubted appellant's marketing sincerity because -- while distinguishing between the two "Phantoms" in its advertising -- it did so discreetly, reserving "[t]he big type for the show's resonant title with a banner head reading '"The Original London Stage Musical' "' ["Canny marketing"]. The articles additionally reveal that Kelly's judgment about the advertising was based at least in part on his subjective view that Hill's show lacked artistic merit; it must be the result of deceptive marketing, he implied, if "a spoof without stars or anyone of theatrical name value" could produce $400,000 in ticket sales in a few days. ["Canny marketing"]. Cf. United States Medical Corp. v. M.D. Buyline, Inc., 753 F. Supp. 676, 677, 679 (S.D. Ohio 1990) (no background facts offered to readers to explain statement that plaintiff "consistently gouges customers on price and service").

On the other hand, Kelly forthrightly reported that not everyone shared his artistic judgment, and that the Hill production had encountered its fair share of success. In "The

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11/ "The phantom 'Phantom'" contains similar information about each production.

phantom 'Phantom,'" he quoted producer Reinis' report that 200,000 people saw the production during a lengthy run in San Francisco, as well as Reinis' claim that "[c]ritics may not like us, but audiences do." This competing information about the merit of Hill's "Phantom" underscored the personal and non factual nature of Kelly's views about the production and its attendant publicity.

Kelly's full disclosure of the facts underlying his judgment -- none of which have been challenged as false -- makes this case fundamentally different from Milkovich. The column found actionable there focused on a court decision reversing an administrative ruling that had suspended a high school wrestling team from a tournament because of a brawl at an earlier meet. The column was headlined, "Maple [Heights High School] beat the law with the 'big lie,'" and the writer's theory was that school officials had lied at the court hearing in order to persuade the judge to overrule the athletic association's decision. See 110 S. Ct. at 2698 n.2.

The reporter had not been at the judicial proceeding. The column noted, however, that he had been the only non-involved person at both the controversial meet and the administrative hearing, a fact that could have suggested to readers that he was uniquely situated to draw the inference of lying. The column contained no response from the targets of the criticism.

Thus, the article in Milkovich, unlike Kelly's "Phantom" columns, was not based on facts accessible to everyone. Indeed, a reader reasonably could have understood the reporter in Milkovich to be suggesting that he was singularly capable of evaluating the plaintiffs' conduct. In contrast, neither of Kelly's columns indicated that he, or anyone else, had more information about Phantom Touring's marketing practices than

was reported in the articles.[12] While Kelly's readers implicitly were invited to draw their own conclusions from the mixed information provided, the Milkovich readers implicitly were told that only one conclusion was possible. This is a crucial distinction, and it makes it clear why the result reached in Milkovich is inappropriate here.

In this case, the comprehensive nature of the information provided in the articles, aided by the column format and the style and tenor of the writing, lead inevitably to the conclusion that no reasonable reader could interpret Kelly's statements as factual assertions of dishonesty. Accordingly, under Milkovich, they are not actionable.[13]

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[12] In its brief, appellant contends that the Globe lent support to its defamatory accusations by reporting that the Georgia Governor's Office of Consumer Affairs required an advertising disclaimer distinguishing Hill's show from Webber's. We note, first, that this information did not appear in the two "Backstage" columns that contain the language warranting our attention. Second, the two articles that did contain this information pointed out that appellant's Boston advertising included a disclaimer, and thus implicitly told readers that the advertising was legally adequate. ["Ticket buyers are still hot for 'Phantom,'" and "Williams and 'The Phantom.'"]

[13] Although the Supreme Court's discussion in Milkovich did not explicitly address statements reasonably viewed only as opinion because based on fully disclosed information, its reaffirmation of the line of cases represented by Bresler, 398 U.S. at 6, Letter Carriers, 418 U.S. at 264, and Falwell, 485 U.S. at 46, confirmed that, to be actionable, a challenged statement must be understood as stating actual facts about an individual. That principle unquestionably excludes from defamation liability not only statements of rhetorical hyperbole -- the type of

(continued...)

III. Conclusion

The Supreme Court in Milkovich reasserted its commitment to ensuring that debate on public issues remain uninhibited, robust, and wide-open,'" 110 S. Ct. at 2706 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)), while acknowledging the countervailing concern that due weight be given to society's "'pervasive and strong interest in preventing and redressing attacks upon reputation,'" id. at 2707 (quoting Rosenblatt v. Baer, 383 U.S. 75, 86 (1966)). For the reasons we have explained, the Globe articles tread a permissible path.

The judgment of the district court is therefore affirmed.

13/(...continued)
speech at issue in the Bresler-Letter Carriers-Falwell cases -- but also statements clearly recognizable as pure opinion because their factual premises are revealed. See Milkovich, 110 S. Ct. at 2712 n.7 (dissenting opinion of Brennan, J.). Both types of assertions have an identical impact on readers -- neither reasonably appearing factual -- and hence are protected equally under the principles espoused in Milkovich. A number of courts, including Massachusetts, have immunized statements of opinion based on fully disclosed nondefamatory facts. See National Ass'n of Government Employees, Inc. v. Central Broadcasting Corp., 379 Mass. 220, 226-28, 396 N.E.2d 996 (1979) ("[A] state of affairs in which opinion is recognizable as such because its factual ingredient is known or assumed, presents a clear case for full First Amendment protection including freedom from civil liability.") See also, . Potomac Valve & Fitting Inc., 829 F.2d 1280, 1290 (4th Cir. 1987); Dunlap v. Wayne, 105 Wash. 2d 529, 540, 716 p.2d 842, 848-49 (1986); Restatement (Second) of Torts § 566 comment c (1977).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

PHANTOM TOURING COMPANY, a Pennsylvania General Partnership,	)	
Plaintiff,	)	CIVIL ACTION
v.	)	
	)	No. 89-2504-S
AFFILIATED PUBLICATIONS, INC., a Massachusetts Corporation; GLOBE NEWSPAPER CORPORATION, a Massachusetts Corporation; KEVIN KELLY, an individual; and PATTI HARTIGAN, an individual,	)	
Defendants.	)	

ORDER GRANTING
MOTION FOR JUDGMENT ON THE PLEADINGS[14/]

ALLOWED. The pleadings now having been closed, this motion is ripe for determination. I have carefully examined the publications and conclude that in context they contain only protected expressions of opinion, and do not imply criminal

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14/ The District Court's Order granting the Motion For Judgment On The Pleadings was hand-written in the margin of the first page of the defendants' Motion.

conduct on the part of the plaintiff. Judgment for the defendants shall enter on the complaint. A scheduling conference for disposition of the counterclaims will be held on Monday, January 8, 1990 at 2:30 p.m.

/s/ Walter Jay Skinner, U.S.D.J.

Entered January 5, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

PHANTOM TOURING COMPANY, a Pennsylvania General Partnership,	)	
Plaintiff,	)	CIVIL ACTION
v.	)	
	)	No. 89-2504-S
AFFILIATED PUBLICATIONS, INC., a Massachusetts Corporation; GLOBE NEWSPAPER CORPORATION, a Massachusetts Corporation; KEVIN KELLY, an individual; and PATTI HARTIGAN, an individual,	)	
Defendants.	)	

ORDER DENYING MOTION
FOR RECONSIDERATION[15/]

Denied.

W.J. Skinner, U.S.D.J

Entered April 18, 1990

15/ This order was hand-written in the margin of the first page of petitioner's Motion For Reconsideration.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

PHANTOM TOURING COMPANY, a Pennsylvania General Partnership,	)	
Plaintiff,	)	CIVIL ACTION
v.	)	No. 89-2504-S
AFFILIATED PUBLICATIONS, INC., a Massachusetts Corporation; GLOBE NEWSPAPER CORPORATION, a Massachusetts Corporation; KEVIN KELLY, an individual; and PATTI HARTIGAN, an individual,	)	
Defendants.	)	

ORDER DENYING MOTION TO VACATE[16/]

DENIED. In my opinion the judgment should stand even in the light of Milkovich.

W.J. Skinner, U.S.D.J

Entered December 13, 1990

16/ This order was hand-written in the margin of the first page of petitioner's Motion To Vacate And Memorandum Of Supporting Authority.

Backstage: The phantom of "The Phantom"
By Kevin Kelly
Globe Staff

What is looming in the dark is the case of The Real and the Fake Phantom. The names to remember are Andrew Lloyd Webber and Ken Hill.

Announcing that tickets go on sale Oct. 2, the Wang Center has a one-week booking beginning Jan 8 of "The Phantom of the Opera." Don't rush to the box office (just yet). Don't call Teletron (you can't get them to answer the phone anyway). The "Phantom" coming to the Wang for eight performances is the work of Ken Hill, an adaptation of the 1911 Gaston Leroux novel, which is in the public domain. During a phone conversation this week, David Richards, drama critic for the Washington Post, called it "a rip-off, a fraud, a scandal, a snake-oil job."

But according to the Wang's Josiah Spaulding Jr., who saw the Hill production and the Warner Theater in Washington in early September, "It's simply a different concept from Webber's; it's well-acted, with fine sets, good production numbers."

Spaulding said this week that he has been following the show's progress for several months.

"The Wang booking is strictly a rental," he said. "There are two things here. We're not in the business of denying any genre to come and rent the hall, but we very much are in the business of telling the public what they should expect to see."

It's exactly this expectation that has caused so much concern. It is almost inconceivable that Hill's "Phantom" would be playing a 4,000-seat theater like the Wang without the success of Webber's "Phantom." Admittedly or not, Hill has

been thriving off the confusion created by the two productions. Hill's "Phantom," to quote from Richards' review, "bears as much resemblance to its celebrated counterpart as Jell-O does to Baked Alaska."

While swearing that the public is informed of the differences between the two, Hill & Company has been running ads headlined "Original London production." Hill's "Phantom" was indeed staged in London in 1984 (two years before Webber), but the link to Webber's $5 million "Phantom" -- which is now in its third year in the West End and shortly to enter its second year on Broadway -- has to be subliminally deliberate. The advertising amounts to truth-in-advertising with an undertow. When Hill's American producer Jonathan Reinis was asked about the connection, he said, "We were there first." Then he coyly sidestepped the issue.

In the midst of this coyness, there's a note of dramatic irony. Ken Hill, who is British, first wrote his play in 1976 for the Duke's Playhouse in Lancaster. He was inspired more by the 1929 Lon Chaney movie, he has said, than by Leroux. His idea was to spoof the way "Phantom" would have been done during the glory days of the Paris Opera. The music was taken from Bach, Mozart, Offenbach, Verdi, Donizetti and Gounod, with lyrics to the arias supplied by Hill. The spoof -- Grand Guignol with gags -- was revived eight years later, in 1984, at the 600-seat Theater Royal in East London. Among the patrons were two important theater men, Andrew Lloyd Webber and Cameron Mackintosh. They were impressed and began negotiations to bring Ken Hill's "Phantom of the Opera" to the West End.

According to Reinis, "Webber and Mackintosh never called back. Webber simply took his stimulus from Ken's 'Phantom' to write his own." Without explaining (or dramatizing) further, Reinis then said, "Ken had approached Sarah Brightman to play Christine (the female lead)." In 1984

Sarah Brightman became Mrs. Andrew Lloyd Webber. In 1986, she starred as Webber's Christine opposite Michael Crawford as the Phantom.

Reinis became involved with Hill in 1986 when the St. Louis Rep revived the show. He bought the rights for San Francisco's 700-seat Theater-in-the-Square. "It ran 10 months, was seen by 200,000 people, and grossed $3.4 million." Emboldened by this success, he decided to meet Webber's megahit straight on. In company with Electric Factory Concerts, which books the Rolling Stones and the Who, Reinis mapped out a 50-city national tour. The production, Reinis said, has been expanded (cast of 11 raised by three, "band augmented," scenery improved). The budget is now $1 million. The local presenter for the Wang engagement is Bob Duteau and Cafferty's Concerts.

So the question comes down to, is Hill & Company trying to score off the success of Andrew Lloyd Webber's "Phantom"?

"Whatever confusion there is between the two," Reinis said, "it's about time Ken Hill got his just desserts," a statement implying that Hill has been ill used by Webber and Mackintosh. "They've wished us luck. Our attitude is: we're not Andrew Lloyd Webber's 'Phantom.' We say that clearly in the ads. We're not a melodrama. We're musical comedy in the old-fashioned sense. We're nothing near the scope and size of Webber's 'Phantom.' We're an evening's event for entertainment. Our attitude is, you can enjoy both for completely different reasons."

Sounds democratic, sounds sensible. But what about those nasty critics on the road?

"We've got a lot of favorable press. Critics may not like us, but audiences do. We were booked in Washington for two

weeks. It was the start of the tour and we really needed a week to set up before the press came in. The critics just happened to hit us on a bad night, that's all."

Jean Wagner, public relations person for the Warner in Washington, said that the show was "virtually sold out before it came to town," the result of television and radio spots and print ads. Wagner also said the theater demanded the public be informed the production "had nothing to do with Andrew Lloyd Webber," a demand made because of "considerable confusion in Atlanta when the show was listed as part of a series and it wasn't clear what people were buying." Ticket sales fell off at the Warner after the "mixed reviews" came out but, according to Wagner, "there really weren't many seats available anyway, we were almost SRO." David Richards said there "was a deliberate dodge to keep critics out by delaying opening night."

Some people are willing to pay their money, take their chances.

Some wait for the critics they trust.

But the problem, as I see it here, specifically at the Wang Center, is one of wide-open gullibility. The Wang has been steadily trying to make us love it, to woo us into its warm gilt splendors, has been steadily trying to make itself known as a musical house as resonant and comfortable as its neighbors, the Colonial and the Shubert. Some productions have worked within its wide walls, some have not.

Since 4,000 seats are a lot to fill, the Wang has been appealing to the relatively unsophisticated theatergoer and, it seems, has been winning their support (except I often get mail complaining about the sound system and the sight lines from the barnyard depths at the back of the house). People are likely to flock to Hill's "Phantom of the Opera" thinking they're seeing the Broadway blockbuster no matter what they are told. Reinis

seemed to suggest that you can ask for your money back if you think you've been hoodwinked, but that's not what you hear about the general "Buyers Beware" warning on the Teletron recording.

To add more confusion, there's a third "Phantom" production out there in the dark. And I'm not kidding. This one advertised itself in Miami simultaneously with Hill's version. Based on the Lon Chaney movie, it's non-union (read amateur) and being hauled through one-night stands. If all this isn't enough, the night is full of whispers about a "Phantom" miniseries.

Anyway, the Webber "Phantom" is rumored to be a Wang Center possibility during the spring of 1991. As a token gesture (if not an attempt to bolster Boston's patience), "An Evening with Andrew Lloyd Webber," with Sarah Brightman and full orchestra, supposedly has been scheduled next April 9-15.

Ticket buyers are still hot for "Phantom"
By Patti Hartigan
Special to the Globe

Customers continued to prove the value of name recognition yesterday at the Wang Center for the Performing Arts, where advance sales for Ken Hill's "The Phantom of the Opera" were expected to reach $500,000 by the end of the day. The production is being billed as "the Original London Stage Musical" but is in no way related to the Andrew Lloyd Webber "Phantom" that was a smash hit in London and has broken all ticket records in New York since it opened in January 1988.

The Hill version, which played London in 1984 and played San Francisco for 10 months last year, is a small musical with songs from Verdi, Gounod, Offenbach, Mozart and Donizetti. It is a campy comedy spoof rather than the grand melodramatic spectacle by Lloyd Webber that most people associate with the title.

But apparently ticket buyers don't care or aren't aware of the difference. The advertisements for the Hill "Phantom", which opens a week-long run Jan. 8, contain a quote from a review pointing out that this is not the Lloyd Webber production. The quote, which is attributed to CBS news, is actually from a review that aired on the San Francisco CBS affiliate KPIX. The ads came into question in May when ticket sales opened in Atlanta, one of the stops on the 70-week national tour. The Georgia Governor's Office of Consumer Affairs looked into the possibility of deception, but determined that the advertisements were not deceptive as long as they included a disclaimer that the show was not the Lloyd Webber version.

Representatives from the Massachusetts Attorney General's Office and the state's Executive Office of Consumer

Affairs said yesterday that they had not received any phone calls concerning the Hill "Phantom" at the Wang Center.

The Hill "Phantom" producers have taken legal action of their own in Atlanta and Cincinnati. The Hill Phantom Touring Co. and its primary partner Philadelphia-based Electric Factory Concerts filed a libel and slander suit against Atlanta promoter Chris Manos, who they claim warned theatergoers to wait for the real "Phantom." The suit is still in litigation. In addition, the producers sued Broadway Series Management Corp., the Cincinnati Theatrical Association and the Cincinnati Masonic Temple Co. for conspiracy to prevent the Hill "Phantom" from playing at Cincinnati's Taft Theater. The suit has since been settled out of court.

Jonathan Reinis, who produced the show in San Francisco and is a co-producer of the national tour, readily admits that the public interest in Hill's "Phantom" is partly due to the Lloyd Webber phenomenon. Merle Frimark of Fred Nathan, Inc., the New York company that handles publicity for the Broadway "Phantom" said that Lloyd Webber and producer Cameron Mackintosh had no comment about the Hill version. "Their response has been that 'Phantom' is in the public domain and they've always wished (the Hill production) well," she said.

Reinis said that the promoters are doing everything possible to make the public aware of the distinction between the two productions. Operators at the Wang Center and at Ticketmaster have been instructed to inform callers that this is not the Lloyd Webber production. Wang Center operators consistently offered the information when reached yesterday. After repeated calls to Ticketmaster, the Globe reached two different operators yesterday. Both operators failed to offer any information about the Hill "Phantom" when asked about ticket availability.

The Wang Center will have an unprecedented refund policy for the show, but President Josiah Spaulding said yesterday the terms of the refund agreement have not been determined, adding that customers will be able to return tickets up to a certain date prior to attending the performance. He said that not one customer has requested a refund yet.

And ticket sales are rapidly approaching the Wang Center box office record of $760,000 for a week-long theater booking that was set this summer by "A Chorus Line." A show has not gone on sale so far in advance in Boston since "Les Miserables" began a six-month run in December, 1987. "Les Miserables" broke Boston box office records and included a pre-opening marketing blitz that cost $250,000. The pre-opening advertising budget for the Hill "Phantom" is $70,000, but even without a "Les Miserables" style media blitz, ticket sales are still going strong.

Stage Review: "Fiddler" is the real thing
By Kevin Kelly
Globe Staff

After all these years -- 25 to be exact -- it might be easy to be confused by "Fiddler on the Roof," especially at the Wang Center, where hordes of people are currently being suckered in by a second-hand version of "Phantom of the Opera" due in January. Is this really "Fiddler," or is it "Cat on a Hot Tin Roof" or "Cabin in the Sky" or, maybe, just "Jerome Robbins' Broadway" in a shtetl? Is this the one with Zero, with Luther, with Herschel, with Topol? Is it the original or cardboard? Is it Jewish or non-denominational?

The real question is, whatever it is, is it worth it?

The answer: Not only is the current production worth it, but it's also one of the single best "Fiddlers" seen outside Broadway and ranks right up there with the 1980 revival with Herschel Bernardi. In its comic/tragic performance by Topol as Tevye, in its shrewd and telling mix of humor and heartbreak, its steadily accumulating details of history and its warning of disaster, it is both heartening and terrifying. Behind the simple wonder of a musical having been put together to entertain us, "Fiddler" is a majestic statement on the will to survive, a testament to triumph. And nowhere in the popular musical theater has it been more clearly expressed.

Topol's performance is perfect. There is never a moment when Tevye escapes him or vice versa. In my slightly wavering memory, Zero Mostel, the original Tevye in 1964, was more comedic, a self-conscious attempt, perhaps, at creating instant lovability. He was also less imposing, much more easily God's finger-wagging fool. Topol, whose bluff is matched by height, is tall enough to stare God in the eye (almost) and, as such, the battle is more evenly matched. When he thanks God for being "blessed with five daughters and a life of poverty," the

irony is meek, and all the funnier in its meekness. But when he wishes God would sometimes seek out someone other than the Jews for suffering, there is an odd measure of threat behind his wish. Topol's Tevye could get even. Pushed too far, he'd be empowered.

In the moments of comic interplay -- and, as written by Sholom Aleichem, Tevye is a humorous man, the tragic clown in a pogrom -- Topol is no less telling. The fake voice he uses in the nightmare sequence with the dancing spirit of Lazar Wolf's banshee wife; the vaudeville banter with Motel; the run-on malapropped myths he borrows from the Bible, all of this is done with restraint and split-second timing. Having played the role off and on since 1967, as well as in the movie in 1971, Topol now seems to be fresher, fiercer and funnier than he was at the beginning. (He's also much closer to Tevye's real age.) Simply put, it's a monumental performance.

Under the direction of Ruth Mitchell, who has "reproduced" the original staging by Jerome Robbins, the current production is first-rate in nearly all departments. Ken Billington's lighting patterns and Christopher Bond's sound system were both faulty, with the sound more distracting than the occasional wide play of shadows. Although the show is obviously a touring package, it has been professionally bundled. Boris Aronson's whimsical, Chagall-like setting at first seems to beckon us to a fairy tale. The ramshackle village of Anatevka, behind a rustic fence, swirls away on a painted backdrop. Gradually, the swirl comes to stand for the horror of the Russian revolution. The front of Tevye's little house opens out like an embrace to bring us into the kitchen with other rooms in other houses on either side of it (for the moving "Sabbath Prayer"). The space is effectively used, although the Wang's open stage does require inner proscenium arches to create the intimacy intended.

Except for the performance of "Fiddler" veteran Ruth Jaroslow, who is now playing Yente the Matchmaker like a bulky Joan Rivers down on the farm, and Jerry Matz, who makes the fake-bearded rabbi too much of a cartoon, the cast is pretty exceptional. Rosalind Harris is an irritating Fride, as she should be. The daughters are sweetly played by Sharon Lawrence (as Tzeitel), Tia Riebling (Hodel), Jennifer Prescott (Chava), Kathy St. George (Shprintze) and Judy Dodd (Bielke). Jack Kenny is shy and fearful as Motel, the tailor, while Gary Schwartz is bold and fearless as Perchik, the revolutionary. Mark Damon is fine as Fyedka, the Russian in love with Chava. Joel Kramer, as Lazar Wolf, and Mike O'Carroll, as the Constable, interpret their roles broadly but get by.

Beyond the obvious attention given to the acting, the musical sequences have been similarly drilled. The current cast is as proficient as the memorable 1980 ensemble. Jerome Robbins' choreography has been reproduced by Sammy Dallas Bayes (one of the villagers in the original production), and it's a knockout. There's a lot of dancing. The richness with which Robbins reinvented the ethnic spirit in his dances is extraordinarily inventive. There are also wonderful songs by Jerry Bock and Sheldon Harnick ("Tradition," "To Life," "Sunrise, Sunset," "Far from the Home I Love"), and, whether comic or romantic, plaintive or rousing, they're eloquently sung. Eloquence, in fact, is what you carry with you when you leave "Fiddler on the Roof," the eloquence of something that turns seamlessly from a kind of compassionate entertainment to something profoundly serious.

Unlike the misleading ads ("The Original London Stage Musical") subliminally linking the Wang's upcoming "Phantom of the Opera" to Andrew Lloyd Webber's international hit, this "Fiddler on the Roof" is not the Original Broadway Stage Musical, nor even the 1967 London version that starred Topol. It's simply and honestly a road show. And so splendid it earns

the right to call itself "Fiddler's" 25th Anniversary Production and really mean it as a celebration.

Backstage: Canny, confusing marketing for this "Phantom"
By Kevin Kelly
Globe Staff

Phantoms disappear but this one won't go away. And, in fact, may set up shop here.

Despite Boston Globe news stories stating that the "Phantom of the Opera" coming to the Wang Center in January is not by Andrew Lloyd Webber/is not by Andrew Lloyd Webber/is not by Andrew Lloyd Webber/no no no is SURELY NOT by Andrew Lloyd Webber, people have been buying tickets by the bushel. There are rumors that scalpers are horning in on the act, securing bundles for later resale, resale that would have to be accomplished before the show opens Jan. 9 and its true identity is known. Further rumors have the initial eight-performance booking being extended two, three, four weeks.

When it was suggested to Josiah Spaulding, who heads the Wang (and wags it) that, surely, he must be aware the incoming "Phantom" -- a musical comedy by Ken Hill -- is deliberately confusing people; that, in fact, it wouldn't be on tour at all if the Webber "Phantom" had not become the megahit it has, he said to me, "We're not in the business of denying any genre to come here and rent the hall."

Then he added, "But we are in the business of telling the people what they should expect to see.

On Friday last week, the Wang's big black letter marquee advertising "Fiddler on the Roof," which was to open approximately 90 hours later on Tuesday, was replaced with letters spelling out "Phantom of the Opera." There were no words up there disclaiming anything. There were, however, discreet, white stationery sheets glued to the Wang box office windows saying this was not the work by Andrew Lloyd Webber.

With the ultimate artistry used in the Wang ads, which ran last Sunday, the box office posting suggested that what was being sold was even better than Webber. "This is the original stage musical, mixing comedy, melodrama and opera." The Webber "Phantom," by deliberate insinuation, was not original. Insinuation being an interpretation, how do I know it was deliberate? Because the Ken Hill ad campaign gives exactly the same kind of message.

The Sunday print ads, for example, don't mention Webber in big type, but his name is cannily inserted in two quote ads, one from CBS News, one from the Philadelphia Daily News. The big type is reserved for the show's resonant title with a banner head reading "The Original London Stage Musical." Hill's version did, indeed, play London. Further, it seems to have been the inspiration for Webber and his producer, Cameron Mackintosh, who saw it and have admitted as much in George Perry's book, "The Complete Phantom of the Opera."

Yet, it is the Webber "Phantom" that is currently the big hit in London, and has been since it opened in 1986. It is the Webber "Phantom" that has broken box office records wherever it has played. It is the Webber "Phantom" that's original. Hill uses music from Verdi, Gounod, Offenbach, Mozart and Donizetti. Webber wrote his own. Hill's is a self-styled "melodramatic spoof." Webber's has a serious book written by himself and Richard Stilgoe.

So what precisely does the Wang Center mean when it says it will keep the public apprised? Are we really to believe that over $400,000 worth of tickets were sold in a few days for an operatic spoof, a spoof without stars or anyone of theatrical name value? Are we to believe that out of nowhere has swirled an anonymous "Phantom" with enough artistry to compete with its better-known counterpart? Are we to applaud the Wang Center for attending people waiting in line and giving them

coffee and saying, "This is not by Andrew Lloyd Webber"? Is that enough to justify a rip-off?

The Globe's Living/Arts department clocked approximately 20 phone calls the Monday after the Sunday "Phantom" ad, 10 or more the following day, and then they dwindled off. When a suggestion was made to one caller that she try to get information from the Wang Center, she said she had and the Center refused to answer her questions. I've heard similar complaints.

Meanwhile, the rush rushes on, all the while the Wang would have us believe it has done its public-spirited duty.

Why should a theater be interested in public-spiritedness? Because, in the Wang's case, there has been a concerted attempt by the Wang management to present the Center as a perfectly suitable adjunct to the Shubert, the Wilbur and the Colonial. There've been social functions, free exhibits, come-one/come-all gatherings in the Wang lobby, an outreach program to stimulate non-theatergoers. Some of it seems to have worked. But now there may be some skepticism about all that easily generous hoopla.

Whatever the merits of Hill's "Phantom" turn out to be, an awful lot of people are going to feel had, even if they've been had by their own inattention. Spaulding & Company have done their duty, right? And there've been ex cathedra warnings like this. What more can be done?

One local producer turned down the Hill "Phantom" on strict ethical grounds. He has said, "I saw the lines outside the Wang Center the other day. What can you say? Barnum was right."

Williams and "The Phantom"
By Patti Hartigan
Special to the Globe

Talk show host Jerry Williams yesterday jumped headlong into the controversy surrounding Ken Hill's "The Phantom of the Opera" at the Wang Center for the Performing Arts. The WRKO host said he had been "taken in" by advertisements for what he called the "phony 'Phantom,'" which opens at the Wang Center Jan. 8. The ads bill the show as the "Original London Stage Musical," but it is not the famous "Phantom" written by Andrew Lloyd Webber that broke all box office records in New York. Williams read a column from Friday's Globe by theater critic Kevin Kelly in which he said that the promoters are blatantly misleading the public.

The ads in question distinguish the show from the Lloyd Webber version in two quotations taken from reviews: these quotes are in small print, while the "Original London" claim is in large type. Williams said many consumers did not notice the quotes and bought tickets under the assumption they were going to see the Broadway version. He devoted more than two hours to the discussion, and several callers vented their anger on the air. One caller blamed the promoters, and not the Wang Center, but most callers said that the show was a rip-off.

The show's producers have claimed that Boston is the only city on the 70-week tour that has generated so much media attention, but in Atlanta the coverage was extensive, especially after the Georgia Governor's Office of Consumer Affairs issued a cease and desist order to the show's promoters. This action ordered the promoters to immediately stop misrepresenting the production to the public and to inform ticket buyers what they were buying.

In Boston, the presenters have asserted that all customers are being told the production is not by Lloyd

Webber, but in repeated calls to Ticketmaster over the past three days, not one operator offered the information. The Wang Center is offering an unprecedented ticket refund offer at point of sale; as of yesterday, according to a Wang spokesperson, about a dozen people had requested refunds.

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No. 91-1726

In The

Supreme Court of the United States

October Term, 1991

PHANTOM TOURING COMPANY,

Petitioner,

vs.

AFFILIATED PUBLICATIONS, INC., GLOBE NEWSPAPER COMPANY, KEVIN KELLY and PATTI HARTIGAN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Court of Appeals for the First Circuit properly held that certain newspaper columns and articles concerning petitioner's marketing of a musical comedy version of *The Phantom of the Opera* could not reasonably be interpreted as stating provably false statements or actual facts about the petitioner.

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ADDENDUM

Statement of Ken Hill .....Add. 1

No. 91-1726

In The

Supreme Court of the United States

October Term, 1991

PHANTOM TOURING COMPANY,

Petitioner,

vs.

AFFILIATED PUBLICATIONS, INC., GLOBE NEWSPAPER COMPANY, KEVIN KELLY and PATTI HARTIGAN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE[1]

I. Factual Background

This diversity action was filed by petitioner Phantom Touring Company in November of 1989 in the United States District Court for the District of Massachusetts (Appendix to Petition for Certiorari, p. 5a, hereinafter "App. ____"). Petitioner is the producer of Ken Hill's theatrical version of *The Phantom of the Opera* (hereinafter "Phantom"), which was presented at the Wang Center for Performing Arts in Boston in January 1990 (App. 3a, 22a).

Hill conceived his version of Phantom in 1976 and presented it for the first time in 1977 at the Duke's Playhouse in London (Statement of Ken Hill, Respondents' Addendum at 1, hereinafter "Add. ____).[2] Hill's production was a musical comedy and used the work of composers such as Bach, Mozart, Offenbach, Verdi and Gounod (Record Appendix before the Court of Appeals, pp. 31, 61, hereinafter "R.A. ____").

In 1984, seven years after its first showing, the Hill Production again was staged in London in the Theatre Royal, where Andrew Lloyd Webber saw it (Add. 1-2). The production "was planned for a run of only a few weeks at a small theatre" (Add. 1). After two years of further silence, the Hill production next played St. Louis in 1986 for four weeks (Add. 1).

---

1. Respondent Globe Newspaper Co. ("Globe") is a wholly owned subsidiary of Affiliated Publications, Inc. ("Affiliated"). Affiliated has no parent company. Neither the Globe nor Affiliated has any non-wholly owned subsidiaries or affiliates that have issued shares to the public.

2. The Statement of Ken Hill was filed by petitioner in opposition to respondents' motion for judgment on the pleadings and is part of the record below.

In October of 1986, Webber staged his own version of *The Phantom of the Opera* in London and opened the show on Broadway in January of 1988 (Add. 2). Webber's show was a drama and had its own original musical score (App. 4a). The production received wide acclaim and broke records in both cities (App. 27a, 35a).

In September of 1988, while Webber's Phantom was on Broadway, Hill's production was revived and began a nine-month San Francisco tour (Add. 3). Petitioner conceded below that the decision to begin a national tour of Hill's Phantom was not made until after the San Francisco production which, it also is conceded, did not begin until eight months *after* Webber's Broadway hit was underway (Add. 2-3).

In 1989, the Webber production was continuing its successful Broadway run while the Hill show moved to Georgia (R.A. 32, 62). In May of 1989, as tickets to the Hill production went on sale in Georgia, the Governor's Office of Consumer Affairs issued a cease and desist order against the promoter of the Hill production in Atlanta prohibiting it from selling tickets without clearly disclosing that its production was not the Andrew Lloyd Webber Phantom (R.A. 32, 62).

As the Hill tour continued, *The Boston Globe* (the "Globe"), in several articles and columns, questioned whether the advertising for the Hill production at the Wang was adequate to prevent confusion on the part of theatre-goers (App. 22a-37a). Before the production's arrival in Boston, theatre critic Kevin Kelly quoted unfavorable reviews of the Hill version by out of state critics in his "Backstage" column, and contrasted them to the acclaim surrounding the Webber production (App. 22a-25a). In other columns, Kelly described the potential for confusion on the part of ticket buyers and reported the reaction of the play's producers and promoters to this issue (App. 34a-36a). Globe reporter Patti

Hartigan noted that the producer's measures to distinguish its play from the Webber version did not appear to affect ticket sales in Boston, which were very high (App. 27a-29a). She also reported on the public debate surrounding the play's publicity (App. 37a-38a). A summary of the five Globe columns and articles challenged by petitioner is set forth below.

A. "The Phantom of 'The Phantom' " in "Backstage" column by Kevin Kelly, Boston Globe, September 22, 1989.

The first article for which petitioner seeks relief is a regularly run theatre column titled "Backstage" (App. 22a-26a). The central theme of the article is a rhetorical question posed by Kelly: "[I]s Hill & Company trying to score off the success of Andrew Lloyd Webber's 'Phantom'?" (App. 24a). Kelly's query is followed by a two paragraph retort from Jonathan Reinis, the American producer of the Phantom (App. 24a-25a). Although Reinis' favorable views are not challenged by petitioner, the inclusion of opposing viewpoints, according to petitioner, renders the article libelous. The offensive views include a quote from the Washington Post drama critic David Richards that the Hill production is "a rip-off, a fraud, a scandal, a snake-oil job" and Kelly's own opinion that "[a]dmittedly or not, Hill has been thriving off the confusion created by the two productions" (App. 22a-23a).

Similarly, while petitioner takes no issue with Kelly's description of the literal accuracy of the headline of the Hill production's advertisement as the "Original London production", it argues that liability should be imposed for Kelly's characterization of the ads as a "subliminally deliberate [link to Webber's $5 million 'Phantom']" and as "truth in advertising with an undertow" (App. 23a).

B. "Ticket buyers are still hot for 'Phantom' " by Patti Hartigan, Boston Globe, October 5, 1989.

In this news story, Patti Hartigan reports on booming Phantom ticket sales at the Wang (App. 27a-29a). Petitioner's statement of the case narrows the allegedly actionable material to one sentence in which Ms. Hartigan explains that the production "is being billed as 'the Original London Stage Musical' but is in no way related to the Andrew Lloyd Webber 'Phantom' . . ." (App. 27a). The truthfulness of the challenged statements, however, has been conceded by petitioner (R.A. 31, 61).

C. " 'Fiddler' is the real thing" by Kevin Kelly, Boston Globe, October 5, 1989.

This Kelly column is a review of a production of "Fiddler on the Roof" which includes two references to petitioner's production (App. 30a-33a). While Kelly lauds "Fiddler" in the review, he criticizes the Hill production by comparison. Petitioner specifically objects to Kelly's statement that "hordes of people are currently being suckered in by a second-hand version of 'Phantom' " and his reference to "misleading ads ['The Original London Stage Musical'] subliminally linking" the Hill production to the Webber version (App. 30a, 32a).

D. "Canny, confusing marketing for this 'Phantom' " in "Backstage" column by Kevin Kelly, Boston Globe, October 6, 1989.

Petitioner targets this second "Backstage" column because Kelly raises several questions — some posed rhetorically and some posed to individuals he has interviewed — about the marketing of Hill's Phantom (App. 34a-36a). Kelly first recounts the inquiry he posed to Josiah Spaulding, the head of the Wang that "he [Spaulding] must be aware the incoming Phantom . . . is

deliberately confusing people" (App. 34a). The question is followed directly by Spaulding's response.

The article continues with two paragraphs in which Kelly provides the detail of the Phantom advertisements, including the relative minuteness of their disclaimers when compared to the prominence of their label, "Original London Stage Musical", and facts regarding the comparative chronologies of the two plays (App. 35a). While petitioner never has alleged that the production chronologies contained in the article are false, the questions raised by Kelly, highlighted below, are claimed to be defamatory:

> So what precisely does the Wang Center mean when it says it will keep the public apprised? Are we really to believe that over $400,000 worth of tickets were sold in a few days for an operatic spoof, a spoof without stars or anyone of theatrical name value? *Are we to believe that out of nowhere has swirled an anonymous "Phantom" with enough artistry to compete with its better-known counterpart?* Are we to applaud the Wang Center for attending people waiting in line and giving them coffee and saying, "This is not by Andrew Lloyd Webber"? *Is that enough to justify a rip-off?*

(App. 35a-36a).

E. "Williams and 'The Phantom' " by Patti Hartigan, Boston Globe, October 7, 1989

In this article, Patti Hartigan reports on the public debate surrounding the Phantom publicity (App. 37a-38a). The article discloses the particulars of the advertising and reports that a Wang Center spokesman admitted that "about a dozen people had requested refunds" after learning that their tickets would not admit

them to the Webber play (App. 37a). Petitioner never has taken issue with the accuracy of these facts. It claims, however, that the article is actionable because it reports that a local radio talk-show host said he was "taken in" by the advertising for "the phony 'Phantom' " and because it republishes Kelly's belief that the show's promoters "were blatantly misleading the public" (App. 37a).

II. Proceedings Below

Petitioner's complaint was filed on November 3, 1989 (R.A. 2). The complaint sought preliminary and permanent injunctive relief against further Globe publications concerning petitioner's show and damages for interference with contractual relations, interference with prospective advantageous relations, libel and slander (R.A. 4-19).

On November 27, 1989, respondents moved for judgment on the pleadings (R.A. 2). The factual record before the District Court included the complaint, respondents' answer and counterclaim, petitioner's reply to the counterclaim, and a sworn statement submitted on behalf of petitioner by Ken Hill in opposition to respondents' motion (R.A. 2, Addendum hereto). *See also* Fed. R. Civ. P. 12(c) ("if, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment").

On January 5, 1990, the District Court ruled that the articles contained only protected expressions of opinion and entered judgment for the respondents (App. 18a-19a). The Court did not expressly indicate whether the decision was based on state or federal law. Thereafter, on April 18, 1990, petitioner's motion for reconsideration, predicated on this Court's decision in *Milkovich v. Lorain Journal Co.*, ____ U.S. ____, 110 S. Ct. 2695

(1990), was denied (App. 20a). The only aspect of the judgment challenged on appeal was the dismissal of petitioner's libel claims (App. 3a, n.1). On January 10, 1992, the Court of Appeals for the First Circuit affirmed the judgment of the District Court (App. 1a).

REASONS FOR DENYING THE WRIT

I.

THE FIRST CIRCUIT PROPERLY APPLIED THE STANDARDS SET FORTH IN *MILKOVICH* TO THE UNDISPUTED FACTS OF THIS CASE.

Reduced to essentials, petitioner objects to what it contends is an erroneous result reached by the application of the standards enunciated in *Milkovich* to the facts of this case. No important legal questions of general applicability are raised. No conflict between decisions of the Court of Appeals is implicated.[3] Because the petition centers upon an analysis of petitioner's view of the particular facts involved, certiorari is not warranted. *See generally United States v. Johnston,* 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.") *Graver Tank & Mfg. Co. v Linde Air Products Co.,* 336 U.S. 271, 275 (1949) ("A court of law, such as this Court is, rather than a court for correction of errors in fact-finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."). *See also National Labor Relations Board v. Hendricks County Rural Electric Membership Corp.,* 454 U.S. 170 (1924); *Southern Power Co. v. North Carolina Public Service Co.,* 263 U.S. 508 (1924).

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3. That petitioner perceives a conflict between *Milkovich* and two commentators on libel law is, of course, no substitute for a conflict between the Circuits. *See* Petition at 12-13.

To be sure, petitioner attempts to characterize the First Circuit's decision as a departure from the rules announced in *Milkovich*. That argument, however, cannot survive a reading of either *Milkovich* or the Court of Appeals' opinion. The essence of the holding in *Milkovich* was succinctly stated by the Court of Appeals:

> In *Milkovich*, the Supreme Court dismissed the notion that there is a "wholesale defamation exception for anything that might be labeled 'opinion'." 110 S. Ct. at 2705. It concluded that the relevant question is not whether challenged language may be described as opinion, but whether it reasonably would be understood to declare or imply provable assertions of fact.

Phantom Touring, Inc. v. Affiliated Publications, et al., 953 F.2d 724, 727 (1st Cir. 1992).

As the First Circuit noted, the *Milkovich* Court found that three independent constitutional protections for speech adequately protected the "breathing space" which "freedoms of expression require in order to survive" without the creation of an "artificial dichotomy between 'opinion' and fact." *Milkovich*, 110 S. Ct. at 2706; *Phantom*, 953 F.2d at 727-28.

> Foremost, we think [*Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 707 (1986)] stands for the proposition that a statement on matters of public concern must be provable as false before there can be liability under state defamation laws, at least in situations, like the present, where a media defendant is involved . . . *Hepps* ensures that a statement of opinion relating to matters of public concern which does not contain a provably false

> factual connotation will receive full constitutional protection.

Milkovich, 110 S. Ct. at 2306. The Court of Appeals, quoting and relying upon *Milkovich's* discussion of *Hepps*, accordingly held that statements that are not susceptible of being proved true or false are not actionable. *Phantom*, 953 F.2d at 727

The Court of Appeals relied on *Milkovich's* express approval of a prior line of cases in holding that statements which can not reasonably be interpreted as stating actual facts about a person also are privileged under the First Amendment. *Phantom*, 753 F.2d at 727; *Milkovich*, 110 S. Ct. at 2704-05, 2706-07. *See Greenbelt Cooperative Publishing Ass'n, Inc. v. Bresler*, 398 U.S. 6 (1970) (statement that developer had engaged in blackmail by negotiating to sell city a parcel of land while attempting to obtain a zoning variance on his own behalf was constitutionally protected rhetorical hyperbole); *Old Dominion Branch No. 496, Nat. Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 284-86 (1975) (use of word traitor not basis for defamation action when used in loose, figurative sense); *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988) (First Amendment prohibits recovery for publication which "could not reasonably have been interpreted as stating actual facts about the public figure involved"). *See also Milkovich*, 110 S. Ct. at 2706 ("the *Bresler - Letter Carriers - Falwell* line of cases provide protection for statements that cannot reasonably [be] interpreted as stating actual facts about an individual").

The third independent protection for speech confirmed by *Milkovich*, and articulated by the First Circuit below, is the enhanced appellate review of the record required by *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485 (1984). That heightened level of review "provides assurance that the foregoing determinations will be made in a manner so as not to 'constitute a forbidden intrusion of the field of free

expression.' " *Milkovich*, 110 S. Ct. at 2707 (citation omitted); *Phantom*, 953 F.2d at 727-28.

The tripartite analysis employed by the Court of Appeals thus mirrors perfectly the explicit reasoning and language of *Milkovich*. In accordance with those principles, the Court of Appeals correctly framed its ultimate inquiry as whether the challenged statements reasonably could be understood as stating provable assertions of actual facts. *Phantom*, 953 F.2d at 727, 729-31. *Milkovich* similarly stated that the "dispositive question [is] whether or not a *reasonable* fact finder could conclude that the statements in the [defendant's] column imply an assertion that [the plaintiff] perjured himself." *Milkovich*, 110 S. Ct. at 2707 (emphasis added). *See also Hustler*, 485 U.S. at 50 (publication "could not reasonably have been interpreted as stating actual facts"). *See generally Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) ("The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find . . . that the plaintiff is entitled to a verdict . . .").

In applying the very same standard of whether the challenged statements reasonably could be read as actionable (not some higher, undefined standard as argued by petitioner, *see* Petition at 11, 15), the *Milkovich* Court considered the underlying circumstances of the case, including the nature of the language used, the "general tenor of the article" and whether the defamatory charge was "sufficiently factual to be susceptible of being proved true or false." *Milkovich*, 110 S. Ct. at 2703. *Cf. Anderson*, 477 U.S. at 252 ("The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient [to prevent summary judgment]."). The Court of Appeals thus was fully warranted under *Milkovich* in engaging in a similar analysis of the context and language used in the articles at issue. *Phantom*, 953 F.2d at 728-31.

In view of the Court of Appeals' express application of the three part analysis of *Milkovich*, as well as its adherence to what *Milkovich* described as the "dispositive question" of what a reasonable factfinder could conclude based upon the circumstances of the case before it, the petitioner's assertion that the lower court's analysis was "squarely inconsistent with the governing pronouncement of [*Milkovich*]" is, to be blunt, wholly groundless. Petition at 10. An examination of the purported basis for certiorari reveals that the true gist of the petition is to obtain review not of the legal principles applied by the First Circuit but rather of the conclusions reached when those principles were applied to the facts of this case. Certiorari, however, is not intended for such purposes. *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974) (a perceived error in the judgment reached below is not sufficient by itself to warrant certiorari review); *National Labor Relations Board v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502-03 (1951) ("This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way.")

That is especially so where, as here, the result reached by the Court of Appeals' application of law to the facts of the case is indisputably correct. Respondents' statements that the Hill production is in no way related to the Webber "smash hit" are concededly true and therefore not actionable. Similarly, the unchallenged accuracy of the Report that the Georgia Office of Consumer Affairs investigated the marketing of Hill's Phantom precluded any recovery for such statements. *Phantom*, 953 F.2d at 728-29.

In ruling that it was impossible to verify if Hill's Phantom was "fake" or "phony" or whether its advertising was "subliminally deliberate" or "blatantly misleading the public", the Court properly applied the protections established by *Hepps*

for statements incapable of being proven true or false. So too, the Court correctly held that Kelly's use of such figurative terms as "rip-off, a fraud, a scandal, a snake-oil job" and "truth-in-advertising with an undertow" was fully protected in accordance with the actual facts rationale of *Bresler, Letter Carriers,* and *Falwell. See Phantom,* 953 F.2d at 728.

The Court of Appeals also properly disposed of petitioner's claims that Kelly implied that the marketing for Hill's Phantom was deliberately deceiving the public. *Phantom*, 953 F.2d at 729-31. Indeed, the undisputed inclusion of statements by petitioner in its Massachusetts advertising — albeit in small print — that its show is not the Webber production and a disclaimer to that effect posted at the Wang box office window demonstrate that petitioner itself believed the public needed to be warned to avoid deception. Kelley took issue with the prominence of those warnings, which obviously had been deliberately drafted by petitioner or its agents. Petitioner makes much of the First Circuit's statement that "[a]rguably, the connotation of deliberate deception is sufficiently factual to be proved true or false," such proof being the linchpin of *Hepps'* protection *vel non* for speech. *Id.* at 727, 729. *See also* Petition at 10-11. Petitioner did not, however, demonstrate its falsity. Moreover, by focusing on its prospects under *Hepps*, petitioner ignores the Court's holding that the statements were not reasonably interpreted as stating "actual facts" about petitioner's honesty under the independent *Bresler - Letter Carriers - Falwell* line of cases. *Id.* at 727, 729.

In order to determine whether the statements were protected under *Bresler* and its progeny, the Court of Appeals correctly analyzed the format, tone and content of the articles. In *Bresler*, for example, the Court held that two newspaper articles characterizing a developer's position as "blackmail" were not actionable. In so ruling, the Court examined the statements in context, noting that the reports were "full and accurate," and

that the result might be different "if the reports had been truncated or distorted." 398 U.S. at 13.

> [Petitioner's] proposal was accurately and fully described in each article, along with the accurate statement that some people at the meetings had referred to the proposal as blackmail, and others had indicated they thought Bresler's position not unreasonable.

398 U.S. at 14. *Contrast Milkovich*, 110 S. Ct. at 2698 (column stated that coach "beat the law with the 'big lie' ", and lied his way out of "jam" and that the "judge apparently believed" him, whereas, in fact, the judge overturned his suspension solely on due process grounds, which was not reported). *See also Letter Carriers*, 418 U.S. at 286 (holding that the use of word "traitor" by a union newspaper during a labor dispute did not, in context, state actionable fact about plaintiff).

As in *Bresler* and *Letter Carriers*, the Court of Appeals analyzed the challenged language and its context and determined that a reasonable jury could not conclude that the statements were asserting actual facts about the petitioner. *Phantom*, 953 F.2d at 730.

> Because all sides of the issue, as well as the rationale for Kelly's view, were exposed, the assertion of deceit reasonably could be understood only as Kelly's personal conclusion about the information presented, not as a statement of fact.
>
> * * *
>
> Kelly's full disclosure of the facts underlying his judgment — none of which has been challenged

> as false — makes this case fundamentally different from *Milkovich*.
>
> In this case, the comprehensive nature of the information provided in the articles, aided by the style and tenor of the writing, lead inevitably to the conclusion that no reasonable reader could interpret Kelly's statements as factual assertions of dishonesty. Accordingly, under *Milkovich*, they are not actionable.

Id. at 730-31.

It is not enough to say, as petitioner does, that because deceptive business practices sometimes can be proved in court, allegations of such conduct always must be deemed assertions of actual facts. It is true that the charge of perjury at issue in *Milkovich* was considered verifiable in a perjury action. 110 S. Ct. at 2707. It is also true that charges of blackmail and treason similarly may be proven at trial but, as *Bresler* and *Letter Carriers* demonstrate, such charges are not in all instances assertions of actual facts. Only through an examination of the context and language at issue can distinctions be drawn between what is and what is not an assertion of actual fact.

The Court of Appeals recognized the need to go beyond incantations of buzz words to resolve whether the statements at issue were assertions of actual fact. The Court properly considered the context and language of the entire articles. Its holding is nothing more than a particularized determination that in articles in which factual premises were revealed, respondents' statements could not reasonably be viewed as statements of fact. In reaching its decision, the Court faithfully adhered to the principles of *Milkovich* and reached the correct result. That petitioner disagrees with the judgment reached is not a sufficient basis to grant certiorari.

II.

GRANTING THE PETITION WOULD BE IMPROVIDENT SINCE THE JUDGMENT IS CORRECT AS A MATTER OF STATE LAW.

This Court has stressed that certiorari jurisdiction should be reserved for cases presenting significant issues of federal law and may be denied when the judgment below is correct on another ground. *See The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 183 (1959). In this case, as respondents argued in both lower courts, state law requires the dismissal of petitioner's complaint regardless of petitioner's federal arguments.[4] Under these circumstances, certiorari review is not warranted.

In the leading decision of *National Association of Government Employees*, 379 Mass. 200, 396 N.E. 2d 996 (1979), *cert. denied*, 446 U.S. 935 (1980), the Massachusetts Supreme Judicial Court recognized a privilege for opinions based upon disclosed facts. The Court explicitly stated that although such statements of opinion appeared privileged under the First Amendment,

> [even] *were it not constitutionally required*, we would reach the same result, believing that the action is plainly without merit and the prospect

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4. The Court of Appeals recognized that Massachusetts has "immunized statements of opinion based on fully disclosed non-defamatory facts," 953 F.2d at 737, n.13, but chose not to reach the state law grounds. *Id.* at 727, n.4. It is well-established that a prevailing party may "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected or even considered by the District Court or the Court of Appeals." *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476, n.20 (1979).

> of forcing the defendant to trial in such a case would put an unjustified and serious damper on freedom of expression.

379 Mass. at 233, 396 N.E. 2d at 1004 (emphasis added). *See also Myers v. Boston Magazine Co., Inc.*, 380 Mass. 336, 340-41, n.5, 403 N.E. 2d 376, 379, n.5 (1980) (explaining that *National Ass'n of Gov't Employees* involved an "allegedly libelous statement [that] was an opinion based on disclosed facts," and therefore was nonactionable under the state standard).

Similarly, in *Pritsker v. Brudnoy*, 389 Mass. 776, 452 N.E. 2d 227 (1983), the Supreme Judicial Court reaffirmed the protections for statements of opinion based upon disclosed facts and noted that the privilege was not a function of federal grace alone:

> *However, [Massachusetts] cases also* recognized the distinction, expressed in Restatement (Second) of Torts § 566 (1977), between "pure" opinions — those based on disclosed or assumed nondefamatory facts — and "mixed" opinions — those opinions apparently based on facts regarding the plaintiff or his conduct that have not been stated by the defendant or assumed to exist by the parties to the communication.

389 Mass. at 778, 452 N.E. 2d at 228 (emphasis added). *See also Fleming v. Benzaquin*, 390 Mass. 175, 454 N.E. 2d 95 (1983).

Since all of the challenged statements are concededly true, hyperbole, or expressions of opinion based upon fully disclosed facts, the application of state law upon remand would result in the affirmance of the judgment for the respondents. Because the time and resources of this Court could be better allocated towards

those classes of cases involving the necessary determination of substantial federal questions, certiorari is not warranted. *See Dick v. New York Life Insurance Co.*, 359 U.S. 437, 459 (1959) (Frankfurter, J. dissenting) ("The litigious tendency of our people and the unwillingness of litigants to rest content with adverse decisions after their cause has been litigated in two and often in three courts, leads to attempts to get a final review by the Supreme Court in literally thousands of cases which should never reach the highest Court of the land.")

CONCLUSION

For each of the foregoing reasons, respondents respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

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ADDENDUM — STATEMENT OF KEN HILL

The idea to stage a musical version of "The Phantom of the Opera" was first conceived in 1976 by veteran English playwright and director Ken Hill. If there were earlier versions, he is unaware of them.

He had read the original novel by Gaston Leroux, now in public domain, and was inspired by it when commissioned for a new musical play by the Duke's Playhouse, Lancaster, his only previous experience of the story being the Universal movie of 1943, which did not closely follow the book. Hill did not see the Lon Chaney movie of 1925 until some years after his own production. Defendant's allegation in paragraph 6 of their Counterclaim, that Hill's play was inspired by this movie, is yet another example of the blatant and groundless fabrications engaged in by these defendants. The musical was publicly performed at the Duke's Playhouse, Lancaster in 1977, and contained an original score by an English Composer and a number of original approaches to scenes and characters which differ from the original novel.

In 1984, Hill's Phantom was presented in a slightly different form (tunes from Opera forming the basis of all the songs) at the Theatre Royal in London's East End. The tunes for this were researched by the head of Classical Records, E.M.I., Great Britain, one of his suggestions being a moment from Der Freischutz by Carl Maria von Weber. At no time did it occur to either that there was any similarity between this name and Andrew Lloyd Webber. Nor could it possibly have had any effect. The suggestion that this was deliberate is deeply offensive to both parties. The original production was planned for a run of only a few weeks at a small theatre.

Andrew Lloyd Webber read some of the favorable reviews Hill's Phantom was receiving, and after attending one of its

performances, Webber approached Hill to suggest that the two men cooperate in bringing Hill's musical to London's West End. Webber later played Hill a tune of his own he thought should be included in the production. He also suggested other pieces of opera, together with certain changes to some scenes. Hill researched these suggestions, and began writing the suggested changes sending all the material to Webber. After some weeks, however, Webber decided not to follow up his suggested cooperation, and asked his Producer to convey this fact to Hill. He returned none of Hill's scripts or re-writes, and has not communicated with him since. The song he played is now in his own version.

In July 1986 (some three months *before* Webber's Phantom first opened to the public), Hill's Phantom was presented in St. Louis. It attracted the attention of Don Hughes and his partner Jonathon Reinis, theatre producers based in San Francisco. Reinis's corporation, Jonathon Reinis, Inc., is one of the principals of plaintiff Phantom Touring Company, a general partnership. They intended to bring Hill's Phantom to Reinis's theater in San Francisco, and began negotiations toward that end during the four-week St. Louis production, still months before the public had ever seen Webber's version.

On October 29, 1986, Andrew Lloyd Webber's Phantom first opened to the public, at Her Majesty's Theater in London. Over a year later, Webber's Phantom moved to New York, where it opened at the Majestic Theater on January 26, 1988. Surprisingly, Webber's Phantom contained a number of the original approaches to scenes and characters added to the story by Hill in his stage adaption, and which were not fully a part of the original, public-domain novel.

Addendum

Hill's version, meanwhile, was the subject of the uninterrupted efforts of Reinis to bring the show to San Francisco, beginning even before its closing in St. Louis. The San Francisco production finally opened on September 9, 1988, and enjoyed a highly successful nine-month run there. The success in San Francisco led Reinis and others to join forces in the current Phantom Touring Company, to present the ongoing national tour of Hill's Phantom. This production is in every respect, apart from minor detail, identical with the original London Production, which not only received such good press but inspired Andrew Lloyd Webber to approach Hill.

Add. 4

Addendum

VERIFICATION

I, KEN HILL, do swear and affirm that I have read the foregoing statement of facts concerning the timing of the writing, production and staging of "The Phantom of the Opera", by Ken Hill, based upon the novel by Gaston Leroux, and that the statement of such facts is true and correct to the best of my knowledge, information and belief.

s/ Ken Hill